Manual **004**

Alberta Energy Regulator

Alternative Dispute Resolution Program and Guidelines for Energy Industry Disputes

June 2013

www.aer.ca

ALBERTA ENERGY REGULATOR

Manual 004: Alternative Dispute Resolution Program and Guidelines for Energy Industry Disputes

June 2013

Published by
Alberta Energy Regulator
Suite 1000, 250 – 5 Street SW
Calgary, Alberta
T2P 0R4

Telephone: 403-297-8311
Toll free: 1-855-297-8311
E-mail: inquiries@aer.ca
Website: www.aer.ca

Contents

1 Purpose of the Program 1

2 Alternative Dispute Resolution Overview 1

3 What is Alternative Dispute Resolution? 2

4 Goals and Principles of the AER's ADR Program 2

4.1 Goals 2

4.2 Principles 3

5 Use of ADR 3

6 ADR Participation 4

7 Applications and the ADR Process 4

8 How to Begin a Mediated ADR Process 4

8.1 AER Mediation 5

8.2 Third-Party Mediation 5

9 Preliminary ADR 6

10 Preparing for Mediation and Overview of the Process 7

10.1 Timelines 7

10.2 Costs 7

10.3 Authority to Settle 7

10.4 Confidentiality and Without Prejudice 7

10.5 Technical and Other Information 8

10.6 Binding Agreement 8

11 Summary and Results from ADR 9

12 Additional Information 9

1 Purpose of the Program

This document describes the Alberta Energy Regulator's (AER's) Alternative Dispute Resolution (ADR) program and guidelines, which may be used to assist in the resolution of disputes concerning the Alberta energy industry. This document also replaces *Informational Letter (IL) 2001-01: Appropriate Dispute Resolution (ADR) Program and Guidelines for Energy Industry Disputes*.

The primary aim of the ADR program is to involve stakeholders in a collaborative approach to

- develop a clear understanding of the facts of an energy development,
- address stakeholders' concerns and issues,
- understand and explore stakeholders' interests, and
- develop and examine options for dispute resolution.

The EnerFAQs *All About Alternative Dispute Resolution (ADR)*, available on the AER website at www.aer.ca, provides a more general overview of the AER's ADR program.

2 Alternative Dispute Resolution Overview

The ADR program plays an important role in how the AER fulfills its mandate to help balance the interests of all Albertans in the stewardship of efficient, orderly, and economic development of the province's energy resources. While the majority of energy applications submitted to the AER meet the stakeholder involvement requirements, a small number have outstanding concerns. In these situations, ADR can be used to balance different interests or reduce the number of issues that may require decisions by the AER. The program was developed in response to the desire of AER stakeholders to be more directly involved and have more control in resolving disputes. Our stakeholders include government agencies, industry, the public, special interest groups, First Nations, and Métis. ADR is typically used for public-to-company, landowner-to-company, or company-to-company disputes, although all stakeholders may use an ADR process. The AER encourages all stakeholders to first attempt to cooperatively reach agreement prior to requesting assistance from the AER's ADR team.

The AER recommends the voluntary use of the ADR program to stakeholders. The AER expects companies to engage in a preliminary ADR process for company-to-company disputes to assess whether ADR should be pursued.

3 What is Alternative Dispute Resolution?

Alternative dispute resolution is a process for resolving disputes. ADR attempts to ensure a common understanding of the facts and involves examining different options with the goal of establishing a mutually agreed upon solution.

The AER highlights the importance of using processes appropriate to a given situation to resolve disputes. Appropriate processes may include direct negotiation, arbitration, AER mediation, and third-party mediation.

It is important to recognize that not all matters can or should be resolved without a more formal decision-making process like a public hearing. In such situations and where disputes are unresolved, the AER may determine that a hearing should be held. A hearing is a formal process for resolving a dispute that results in a decision being made by the AER.

4 Goals and Principles of the AER's ADR Program

The goals and principles of the ADR program reflect the desire of the AER and stakeholders to have a range of dispute resolution processes available to develop innovative and satisfactory solutions.

4.1 Goals

- Improve stakeholder relations by
  - promoting a better understanding of the issues and identifying common interests,
  - repairing and enhancing relationships, and
  - enabling parties involved in a dispute to take an active role in resolving the dispute.
- Increase face-to-face discussions between affected landowners and company decision-makers, leading to local solutions to local problems.
- Ensure efficient use of time and resources, which can lead to more routine applications for companies.
- Achieve a higher percentage of resolved stakeholder disputes without holding an AER hearing.
- Partial resolution of concerns supports more effective and efficient hearings by reducing the number of issues that need to be decided when a hearing is required.

4.2 Principles

- ADR may be used as an option to resolve issues, either within or outside the regulatory process, should all parties to the dispute make an informed decision to participate.
- Participation in ADR should be voluntary; however, in certain situations the AER may direct parties to a hearing or other proceeding to participate in ADR, in accordance with section 16(1) of the *Alberta Energy Regulator Rules of Practice*.
- The ADR process will preserve the neutrality of the AER.
- The ADR process will be clear, accessible, flexible, and responsive to the parties and their needs.
- The ADR process will not delay the application process.
- Parties to the process will act in "good faith" and keep an open mind. Good faith means that the parties agree to an open-minded, respectful, and honest discussion to arrive at a mutual solution.
- Discussions within a preliminary ADR meeting or subsequent mediation are confidential and conducted without prejudice unless the parties agree otherwise.

5 Use of ADR

The ADR program is used for disputes pertaining to energy matters regulated by the AER. The AER expects stakeholders to make a substantial effort to resolve concerns before pursuing the ADR program. However, they may contact the AER for information and assistance at any time.

The ADR process may be initiated if stakeholders determine that they cannot resolve a dispute on their own.

ADR can provide an opportunity for parties to the ADR process to develop more complete agreements by dealing with all issues, including those that are outside the AER's jurisdiction.

The ADR team can also be requested to facilitate technical meetings among the stakeholders to enhance discussions aimed at reaching solutions, and it may involve Government of Alberta agencies in the facilitation.

6 ADR Participation

The AER supports issue mitigation and conflict resolution through the ADR program. The ADR program is often used to deal with concerns raised at the stakeholder involvement stage.

Although mediation is voluntary, the AER expects companies in a company-to-company dispute to proceed to a preliminary alternative dispute resolution (PADR) meeting. This PADR meeting, to discuss options and procedures to deal with the dispute, can be conducted by an AER mediator or a third-party mediator.

PADR sessions and mediations can be held face-to-face, over the phone, by teleconference, or by videoconference.

7 Applications and the ADR Process

An application is not a prerequisite to engage in an ADR process. Early dispute resolution in the pre-application phase is a way to get ahead of or prevent a conflict and may identify important modifications or mitigative measures to include in the application.

If a company wishes to proceed with its application, the application may be filed with the AER during the ADR process. Similarly, stakeholders may choose to submit a statement of concern to the AER while ADR is underway.

If a company chooses to submit an application while a dispute remains unresolved, the company must disclose, in a nonroutine application to the AER, the nature and substance of the dispute. A nonroutine application filed due to stakeholder involvement concerns must include a written summary of the outstanding concerns for AER review and consideration.

The development of timelines and deadlines is important in the ADR process. The use of ADR should not delay the AER's decision on the need for or the scheduling of a hearing or the timing of an AER decision on an application. The ADR timelines should also be respectful of other commitments that stakeholders may have. For example, if ranchers or farmers will be engaged in the ADR process, the timelines should respect such things as seeding times, harvest time, or calving season.

8 How to Begin a Mediated ADR Process

Any stakeholder involved in an energy dispute may contact the ADR team at any time to request assistance. The AER may also contact stakeholders involved in a dispute and recommend mediated ADR. Typically, the sooner ADR is initiated, the greater the chance of success.

In reviewing the situation, the AER staff and the parties to the dispute will consider the nature of the conflict, the parties' relationships, and the current status of communications. In consultation with the affected parties, an AER mediator will determine if mediation is appropriate and may assist the parties in accessing other ADR options.

8.1 AER Mediation

The ADR team follows an interest-based, four-stage approach to mediation. Interest-based mediation involves clarifying the interests or determining what motivates the parties to the mediation regarding the issues. The four stages of the mediation are

1) conducting introductions and establishing meeting guidelines,

2) identifying the issues and setting an agenda,

3) exploring each party's interests and developing an understanding among the parties, and

4) reaching a solution and securing a documented agreement.

AER mediators are separate and independent from the application process. They are impartial and are not decision-makers, legal advisors, or solution providers. They can, however, provide regulatory information, as well as evaluate consultation efforts and provide feedback.

If mediation is scheduled and there is an identified need or a strong likelihood that AER staff could add value to the discussions, the AER will consider having AER technical or field staff attend. AER technical or field staff engaged in ADR will recuse themselves from all other AER processes arising from the application to maintain the confidentiality of the ADR process.

All AER staff must maintain fairness and impartiality at all times. The members of the ADR team are trained in conflict management and many team members hold professional designations, including chartered mediator and qualified mediator. As members of the ADR Institute of Alberta, the provincial affiliate of the ADR Institute of Canada, the ADR team adheres to a strict code of ethics.

8.2 Third-Party Mediation

Parties engaged in a dispute may use a neutral third-party mediator (i.e., a mediator that does not work for the AER or any of the concerned parties). Third-party mediators experienced in energy disputes are listed on the AER website.

The parties select a third-party mediator by mutual agreement.

If requested, AER staff will attend third-party mediation sessions to provide regulatory or other technical information.

9 Preliminary ADR

PADR is often the first step to mediation. PADR may be conducted over the phone or in a meeting before AER or third-party mediation.

The purpose of PADR is to discuss the nature and extent of the dispute among the parties and possible options for resolution. The parties, with the assistance of a mediator, will clarify the issues under dispute and discuss matters of process.

PADR is expected for company-to-company disputes and is typically conducted in a face-to-face meeting. PADR may also be used for public- or landowner-to-company disputes. PADR can bring together potentially affected parties to discuss

- the key issues requiring resolution;
- the information that is needed to address the dispute and how it should be obtained, including how to ensure that the parties disclose all relevant information;
- the role of advisors (lawyers, AER staff, and experts);
- costs and payment;
- who should participate in the discussion and the level of authority required;
- options available to resolve the dispute;
- further process steps to be taken;
- meeting location, date, time, and length;
- matters of timing, deadlines, confidentiality, and privacy; and
- willingness to continue to participate in mediation or another process.

PADR, as with the mediation and subsequent mediation meetings, are confidential and without prejudice, unless the parties agree otherwise.

PADR meetings are usually of limited duration and nominal cost. The costs of PADR meetings are typically covered by industry in public- or landowner-to-company disputes. In company-to-company disputes, typically each company should cover its own costs. Costs and payment for future mediations should be discussed and agreed to at the PADR meeting.

Following a PADR session, parties can make an informed decision on whether to proceed with mediation.

10 Preparing for Mediation and Overview of the Process

Once the parties have agreed to proceed with mediation, they may create a mediation agreement setting out the process that they will follow. Prior to the mediation, the parties will also agree to the timing, location, and participants and discuss confidentiality, proceeding without prejudice, decision-making authority, costs, and key issues, as well as generate an agenda for the mediation. These discussions may take place in meetings, over the phone, or via e-mail, fax, or mail.

10.1 Timelines

During the preparation for the mediation, the parties must discuss deadlines and timelines with AER staff. The mediation timelines should be respectful of other commitments that the parties may have such as during seeding and harvest times.

10.2 Costs

Typically in public- or landowner-to-company disputes, the company will cover reasonable costs, as agreed to by the parties. In company-to-company disputes, each company should cover its own costs.

10.3 Authority to Settle

The people responsible for making decisions on behalf of the parties should be involved in any mediated meetings.

10.4 Confidentiality and Without Prejudice

It is important that the parties participating in an ADR process discuss and agree to matters of confidentiality and without prejudice.

- "Confidential" means that nonpublic information disclosed by the parties is not to be shared outside of the ADR process unless otherwise agreed to by all the parties. ADR meetings may not be recorded and do not form part of the record for a hearing or other proceeding. In order to enhance the chances of a successful outcome, an atmosphere of open and free dialogue is encouraged, which involves the absence of recording devices. Parties are encouraged to fully disclose their interests to each other without reservation, which in turn optimizes the range of solutions that can be explored. Parties can choose to record their negotiations outside of the ADR process if they wish and if it is agreed to by all parties.

- "Without prejudice" means that any admissions, concessions, offers to settle, or related discussions made in ADR to help address a party's concerns cannot be raised by the other parties at a hearing unless otherwise agreed to by the parties. ADR discussions are without prejudice in order to encourage parties to make offers without concern of being held to them should the matter not be resolved through ADR. Any offers made in an ADR process may not be heard by the AER in deciding the matter at a hearing. The AER will consider only commitments made by the company during the hearing when making its decision. For additional information, see the EnerFAQs *The AER and You: Agreements, Commitments, and Conditions*.

Parties should discuss confidentiality, without prejudice, and the sharing of information early on in the ADR process.

Any resolution or settlement agreed to must conform to all regulatory and statutory requirements; therefore, certain technical, scientific, or other information or components of an agreement may have to be disclosed to the AER or other regulatory authorities.

10.5 Technical and Other Information

Parties are encouraged to use a collaborative approach to acquiring technical, scientific, and other pertinent information. Once areas of agreement and those under contention have been clearly identified, parties will need to agree to a method of information gathering.

It is equally important that parties agree upon how technical and scientific information used in the mediation will be used in the event that the mediation is not successful or is partially successful. Use of nonconfidential technical and scientific information presented during the mediation process may reduce the costs, as well as the time and effort, for all parties preparing for a hearing.

10.6 Binding Agreement

The parties should strive for a complete agreement that includes

- complete agreement details (e.g., fence type, paint colour, etc.),
- agreement of timelines for fulfillment,
- a process as to what will happen if certain conditions are not fulfilled,
- how to deal with changes in ownership, and
- how to deal with new or unexpected information or circumstances.

The AER does not currently have the authority to enforce private agreements; however, the AER considers it important that parties meet commitments. For further information on binding agreements, refer to the EnerFAQs on agreements, commitments, and conditions.

11 Summary and Results from ADR

ADR provides benefits beyond resolving issues. By using the ADR process, industry and the public have the opportunity to address concerns about most energy activities. ADR discussions can foster trust between participants that can endure the lifespan of an energy development.

Even if it does not result in a complete agreement, the ADR process may still be seen as successful if it improves understanding among the parties or reduces the number of outstanding issues.

Parties should consider the possibility of a partial resolution of the issues or a lack of agreement. Where a partial agreement is reached, the parties may determine, in consultation with AER staff, the most effective way to proceed.

The AER is committed to maintaining the integrity and confidentiality of the mediation process through providing impartial mediators and ADR staff that are independent from the AER application and hearing process.

In the event that an AER hearing is ultimately required on all or some of the issues, the use of technical and scientific information and any other information obtained collaboratively through mediation, as well as a better understanding of the concerns of those involved, should reduce hearing costs and time. Parties must respect the agreed-upon confidentiality of the ADR process should a hearing be held. For further information on the hearing process, refer to *Manual 003: The Hearing Process for the Alberta Energy Regulator* and the EnerFAQs *Having Your Say at an AER Hearing*.

12 Additional Information

For further information on the AER's ADR program, visit the AER website at www.aer.ca, contact your local AER field centre, or call the Customer Contact Centre at 1-855-297-8311.

The annual activity statistics and results for ADR are reported in an annual document available on the AER website.

The EnerFAQs *All About Alternative Dispute Resolution (ADR)* is also available on the AER website and provides a more general overview of the ADR program. Contact information for ADR team members is provided in this EnerFAQs.

Further information regarding ADR is also provided in the *Responsible Energy Development Act*, section 46, and in the *AER Rules of Practice*, section 16.

For additional information on ADR related to specific types of activities or applications, refer to the documents listed below.

Directive 031: REDA Energy Cost Claims
Directive 038: Noise Control
Directive 056: Energy Development Applications and Schedules
Directive 060: Upstream Petroleum Industry Flaring, Incinerating, and Venting
Directive 065: Resources Applications for Oil and Gas Reservoirs
Directive 071: Emergency Preparedness and Response Requirements for the Petroleum Industry
Manual 003: The Hearing Process for the Alberta Energy Regulator